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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 144, 146, and 147

[CMS-9923-NC]

Request for Information Regarding Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Request for information.

SUMMARY: This document is a request for information regarding grandfathered group health plans and grandfathered group health insurance coverage. Given the limited information available regarding such coverage, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (the Departments) are issuing this request for information to gather input from the public in order to better understand the challenges that group health plans and group health insurance issuers face in avoiding a loss of grandfathered status, and to determine whether there are opportunities for the Departments to assist such plans and issuers, consistent with the law, in preserving the

grandfathered status of group health plans and group health insurance coverage in ways that would benefit employers, employee organizations, plan participants and beneficiaries, and other stakeholders.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on [Insert date 30 days after date of publication in the **Federal Register**].

ADDRESSES: Written comments may be submitted to the addresses specified below. Any comment that is submitted will be shared among the Departments. Please do not submit duplicates.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the internet exactly as received and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, refer to file code CMS-9923-NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to **<http://www.regulations.gov>**. Follow the "Submit a comment" instructions.

2. By regular mail. You may mail written comments to the following address
ONLY:

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9923-NC,
P.O. Box 8013,
Baltimore, MD 21244-1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9923-NC,
Mail Stop C4-26-05,
7500 Security Boulevard,
Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the "SUPPLEMENTARY INFORMATION" section.

FOR FURTHER INFORMATION CONTACT:

William Fischer, Internal Revenue Service, Department of the Treasury, at (202) 317-5500.

Matthew Litton or David Sydlík, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335.

Kiahana Brooks, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492-4400.

Customer Service Information:

Individuals interested in obtaining information from the Department of Labor (DOL) concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the DOL's web site (www.dol.gov/ebsa). In addition, information from the Department of Health and Human Services (HHS) on private health insurance coverage and on nonfederal governmental group health plans can be found on the Centers for Medicare & Medicaid Services (CMS) web site (www.cms.gov/cciiio), and information on health care reform can be found at www.HealthCare.gov.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. Comments received before the close of the comment period are posted on the following web site as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that web site to view public comments.

I. Background

A. Purpose

On January 20, 2017, the President issued Executive Order 13765, "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal," (82 FR 8351) "to minimize the unwarranted economic and regulatory burdens of the [Patient Protection and Affordable Care Act (Pub. L. 111-148) and the Health Care and

Education Reconciliation Act of 2010 (Pub. L. 111-152) (collectively, PPACA), as amended].” To meet these objectives, the President directed that the executive departments and agencies with authorities and responsibilities under PPACA, “to the maximum extent permitted by law ... shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of [PPACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.”

The Departments share interpretive jurisdiction over section 1251 of PPACA, which, as described in more detail in section I.B of this document, generally provides that certain group health plans and health insurance coverage existing as of March 23, 2010, the date of enactment of PPACA, (that is, grandfathered health plans) are subject to only certain provisions of PPACA. Consistent with the objectives of Executive Order 13765, the Departments are issuing this request for information to gather input from the public in order to better understand the challenges that group health plans and group health insurance issuers face in avoiding a loss of grandfathered status and to determine whether there are opportunities for the Departments to assist such plans and issuers, consistent with the law, in preserving the grandfathered status of group health plans and group health insurance coverage in ways that would benefit employers, employee organizations, plan participants and beneficiaries, and other stakeholders.

B. Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage

Section 1251 of PPACA provides that grandfathered health plans are subject to only certain provisions of PPACA, for as long as they maintain their status as grandfathered health plans.¹ For example, grandfathered health plans are neither subject to the requirement to cover certain preventive services without cost sharing under section 2713 of the PHS Act, enacted by section 1001 of PPACA, nor the annual limitation on cost sharing set forth under section 1302(c) of PPACA and section 2707(b) of the PHS Act, enacted by section 1201 of PPACA.

On June 17, 2010, the Departments issued interim final rules with request for comments implementing section 1251 of PPACA (75 FR 34538). On November 17, 2010, the Departments issued an amendment to the interim final rules with request for comments to permit certain changes in policies, certificates, or contracts of insurance without loss of grandfathered status (75 FR 70114). Also, over the course of 2010 and 2011, the Departments released Affordable Care Act Implementation Frequently Asked Questions (FAQs) Parts I, II, IV, V, and VI to answer questions related to maintaining a plan's status as a grandfathered health plan.² After consideration of the comments and feedback received

¹ For a list of the market requirement provisions under title XXVII of the Public Health Service Act (PHS Act), as added or amended by PPACA, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986, applicable to grandfathered health plans, visit <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/grandfathered-health-plans-provisions-summary-chart.pdf>.

² See Affordable Care Act Implementation FAQs Part I, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-i.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs.html; Affordable Care Act Implementation FAQs Part II, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-ii.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs2.html; Affordable Care Act Implementation FAQs Part IV, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-iv.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs4.html; Affordable Care Act Implementation FAQs Part V, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-v.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs5.html; and Affordable Care Act Implementation FAQs Part VI, available at

from stakeholders, the Departments issued regulations on November 18, 2015 (80 FR 72192) (November 2015 final rules) that finalized the interim final rules without substantial change and incorporated the clarifications that the Departments had previously provided in other guidance.

In general, under the November 2015 final rules,³ a group health plan or group health insurance coverage is considered grandfathered if it has continuously provided coverage for someone (not necessarily the same person, but at all times at least one person) since March 23, 2010, and if it has not ceased to be a grandfathered plan due to certain actions taken by the plan (or its sponsor) or issuer.

The November 2015 final rules specify when changes to the terms of a plan or coverage cause the plan or coverage to cease to be a grandfathered health plan. Specifically, the regulations outline certain changes to benefits, cost-sharing requirements, and contribution rates that will cause a plan or coverage to relinquish its grandfathered status. The November 2015 final rules state that such changes will cause a plan or coverage to cease to be a grandfathered plan when the changes become effective, regardless of when such changes are adopted. In addition, the November 2015 final rules require that a plan or coverage include a statement that it believes the plan or coverage is a grandfathered health plan, as well as provide contact information for questions and complaints, in any summary of benefits provided under the plan.

The November 2015 final rules further provide that, once grandfathered status is relinquished, there is no opportunity to cure the loss of grandfathered status. Although the

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-vi.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs6.html.

³ See 26 CFR 54.9815-1251, 29 CFR 2590.715-1251, and 45 CFR 147.140.

Departments are interested in ways to assist grandfathered group health plans and grandfathered group health insurance coverage in maintaining their grandfathered status, in the Departments' view, there is no authority for non-grandfathered plans to become grandfathered.

Under the November 2015 final rules, certain changes to a group health plan or coverage will not result in a loss of grandfathered status. For example, new employees and their beneficiaries may enroll in a group health plan or group health insurance coverage without causing a loss of grandfathered status. Further, the addition of a new contributing employer or a new group of employees of an existing contributing employer to a grandfathered multiemployer health plan will not affect the plan's grandfathered status. Also, grandfathered status is determined separately for each benefit package under a group health plan or coverage; thus, if any benefit package under the plan or coverage loses its grandfathered status, it will not affect the grandfathered status of the other benefit packages.

It is the Departments' understanding that the number of group health plans and group health insurance policies that are considered to be grandfathered has declined each year since the enactment of PPACA, but many employers continue to maintain group health plans and coverage that have retained grandfathered status. The Kaiser Family Foundation's annual Employer Health Benefits Survey estimates that approximately 20 percent of employers that offered health benefits to their employees offered at least one grandfathered group health plan in 2018, a decrease from 72 percent in 2011.⁴ The same

⁴ 2018 Employer Health Benefits Survey, Kaiser Family Foundation, available at <https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-13-grandfathered-health-plans/>. See also 2011 Employer Health Benefits Survey, Kaiser Family Foundation, available at: <https://kaiserfamilyfoundation.files.wordpress.com/2013/04/8225.pdf>; and Kaiser Health News FAQ: Grandfathered Health Plans at: <https://khn.org/news/grandfathered-plans-faq/>. Also, the Agency for Healthcare

study also estimates that 16 percent of American workers with employer-sponsored coverage were enrolled in a grandfathered group health plan in 2018, a decrease from 56 percent in 2011. If these estimates are correct, the fact that a significant number of grandfathered group health plans remain indicates that some employers and issuers have found value in preserving grandfathered status, and that some consumers, when given the choice between grandfathered and non-grandfathered employer plans, have found value in choosing to remain in their grandfathered group health plans and coverage.

With respect to the individual market, it is the Departments' understanding that the number of individuals with grandfathered individual health insurance coverage has declined each year since PPACA was enacted and only a small number of individuals are currently enrolled in grandfathered individual health insurance coverage.⁵ Further, grandfathered coverage may not be sold in the individual market to new policyholders. For these reasons, this request for information focuses on grandfathered group health plan and grandfathered group health insurance coverage, and does not address grandfathered individual health insurance coverage.

II. Solicitation of Comments

The Departments are requesting comments to contribute to the Departments' understanding of the issues related to grandfathered health plans, and to estimate the impact of any potential changes to the rules for retention of grandfathered status for group health

Research and Quality, Center for Financing, Access and Cost Trends reports that 22.1 percent of employees were enrolled in grandfathered health plans in 2017 according to 2017 Medical Expenditure Panel Survey - Insurance Component (MEPS-IC) data. The related MEPS-IC survey is available at: https://meps.ahrq.gov/survey_comp/ic_survey/2017/meps10.s.htm.

⁵ See 83 FR 54420, 54429 (Oct. 29, 2018).

plans and group health insurance coverage, both generally and with respect to the following specific areas:

A. Maintaining (or Relinquishing) Grandfathered Status

1. What actions could the Departments take, consistent with the law, to assist group health plan sponsors and group health insurance issuers preserve the grandfathered status of a group health plan or coverage?

2. What challenges do group health plan sponsors and group health insurance issuers face regarding retaining the grandfathered status of a plan or coverage? Does any particular requirement(s) for maintaining grandfathered status create more challenges than others, and if so, how could the requirement(s) be modified to reduce such challenges?

3. For group health plan sponsors and group health insurance issuers that have chosen to preserve grandfathered status of their plans or coverage, what are the primary reasons for doing so? If grandfathered status is preserved so that particular PPACA requirements will not apply to the plan, please specify the particular PPACA requirements not included in the grandfathered plan and explain any related concerns.

4. What are the reasons why participants and beneficiaries have remained enrolled in grandfathered group health plans if alternatives are available?

5. What are the costs, benefits, and other factors considered by plan sponsors and health insurance issuers when considering whether to retain grandfathered status of their plans or coverage?

6. Is preserving grandfathered status important to group health plan participants and beneficiaries? If so, which participants and beneficiaries benefit the most and which, if any,

are affected detrimentally by the employer offering grandfathered group health plan coverage?

7. What is the typical change in benefits, employer contributions or employee organization contributions, and cost-sharing requirements that causes a grandfathered group health plan or grandfathered group health insurance coverage to lose its grandfathered status?

8. Do the grandfathered health plan disclosure requirements in the November 2015 final rules provide adequate, useful, and timely information to plan participants and beneficiaries regarding grandfathered status? If not, how could the disclosure be improved?

B. General Information about Grandfathered Group Health Plans and Group Health Insurance Coverage

1. Other than the Kaiser Family Foundation's "Employer Health Benefits Annual Survey," and the MEPS-IC survey, what data resources are available to help the Departments better understand how many group health plans and group health insurance policies are considered grandfathered and how many participants and beneficiaries are enrolled in such plans and coverage?

2. What are the characteristics (for example, plan size, geographic areas, or industries) of grandfathered group health plans and the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage? Do grandfathered group health plans or the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage share common characteristics?

3. Do group health plan sponsors and group health insurance issuers that have chosen to retain grandfathered status for certain plans, benefit packages, or policies also offer other plans, benefit packages, or policies that are not grandfathered? If so, why?

4. What are the typical differences in benefits, cost-sharing, and premiums (including employer contributions, employee organization contributions, and employee contributions) associated with grandfathered group health plans and grandfathered group health insurance coverage compared to non-grandfathered group health plans?

5. How many group health plan sponsors and group health insurance issuers are considering making changes to their plans or coverage over the next few years that are likely to cause loss of grandfathered status under the November 2015 final rules? How many individuals would be affected?

6. What impact do grandfathered group health plans and grandfathered group health insurance coverage have on the individual and small group market risk pools?

III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. However, section II of this document does contain a general solicitation of comments in the form of a request for information. In accordance with the implementing regulations of the Paperwork Reduction Act of 1995 (PRA), specifically 5 CFR 1320.3(h)(4), this general solicitation is exempt from the PRA. Facts or opinions submitted in response to general solicitations of comments from the public, published in the **Federal Register** or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the

agency's full consideration, are not generally considered information collections and therefore not subject to the PRA. Consequently, there is no need for review by the Office of Management and Budget under the authority of the PRA.

Signed at Washington DC, this 13th day of February, 2019.

Victoria Judson,
Associate Chief Counsel (Employee Benefits, Exempt
Organizations, and Employment Taxes), Internal
Revenue Service, Department of the Treasury.

Signed at Washington DC, this 19th day of February, 2019.

Carol Weiser,
Acting Benefits Tax Counsel, Department of the
Treasury.

Signed at Washington DC, this 13th day of February, 2019.

Preston Rutledge,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: February 13, 2019.

Seema Verma,

Administrator,

Centers for Medicare & Medicaid Services.

Dated: February 13, 2019.

Alex M. Azar II,

Secretary,

Department of Health and Human Services.